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TRENDS AND CHALLENGES IN LAWYER REGULATION: THE IMPACT OF GLOBALIZATION AND TECHNOLOGY

Laurel S. Terry,* Steve Mark,** & Tahlia Gordon***

INTRODUCTION

In the technology field, “Moore’s law” states that capacity doubles approximately every two years.¹ Arguably, a similar phenomenon now exists with respect to developments in the legal profession.² Seemingly every time one turns around, the legal profession and its regulators are facing new questions, new issues, and new pressures—in short, new challenges. The pace of this change has increased, among other reasons, because of globalization, because of technology, and because developments that arise in one country often migrate to other countries.³ These

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1. See *Excerpts from A Conversation with Gordon Moore: Moore’s Law*, INTEL (2005), ftp://download.intel.com/museum/Moores_Law/Video-Transcripts/Excerpts_A_Conversation_with_Gordon_Moore.pdf. For a brief discussion of the impact of technology on lawyers, see Minutes of April 29–30, 2010 Meeting of the ABA Commission on Ethics 20/20, at 10–11, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/apr_2010_minutes.authcheckdam.pdf (remarks of Alan Davidson, Dir. of Pub. Policy, Google).

2. Although this Article refers to the “legal profession” and to “lawyers,” we recognize that these terms can be misleading because of the different meanings these terms have in different jurisdictions. See *infra* notes 26–35 and accompanying text.

3. See Laurel S. Terry, A “How To” Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course, 51 ST. LOUIS U. L.J. 1135, 1138–46 (2007) (discussing the ways in which lawyer regulators and regulations in one country affect other countries). For a concrete example of developments in one country that are cited in others, compare the Australian and U.K. Alternative Business Structure (ABS) developments with the recent lawsuits filed in federal courts in New York, New Jersey, and Connecticut by the U.S. law firm of Jacoby and Meyers. These lawsuits challenge state ethics rules that prohibit outside investment in law firms. See, e.g., Debra Cassens Weiss, *Jacoby & Meyers Sues to Overturn Bans on Nonlawyer Ownership of Law Firms*, A.B.A. J. (May 19, 2011, 6:43 AM CDT), <http://www.abajournal.com/news/article/>

developments have affected not only the portion of the legal profession sometimes referred to as “Big Law,” but also “Main Street” lawyers who practice alone or in small firms, often in geographic locales far removed from Big Law settings.⁴ In addition to the impact on lawyers, globalization has also had a profound impact on regulators and the regulation of the legal profession.⁵

The legal profession and its regulators currently must respond to a number of new developments. As noted above, regulators must be prepared to respond to regulatory developments in one jurisdiction that may have spillover effects in the regulator’s jurisdiction. Examples of this type of development are the U.K. and Australian rules that permit alternative business structures (ABS) for law firms that allow nonlawyer ownership of law firms, public issuance of shares in a law firm, or corporate ownership of such firms, since these firms may have offices in multiple jurisdictions. Regulators must also respond to market-based developments. An example of this type of development is the growth in alternative litigation financing (ALF) and third party investment in lawsuits. Regulators must also respond to other globalization developments, including the ways in which legal education has responded to a global, multidisciplinary world; the growing influence of the BRICS (Brazil, Russia, India, China, and South Africa) economies; and the growth and management of large, often global law firms, including the difficulties that can arise when conflicts rules and regulations differ. Finally, regulators must respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing.

These examples illustrate some of the concrete issues facing the legal profession and its regulators, but are by no means an exhaustive list.⁶ The

jacoby_meyers_sues_to_overturn_bans_on_nonlawyer_ownership_of_law_firms/; see also Complaint for Declaratory and Injunctive Relief, Jacoby & Meyers Law Offices, LLP v. Justices of the Supreme Court of N.J., No. 3:11-cv-02866 (D.N.J. May 18, 2011), available at <http://legalaccessforall.org/wp-content/uploads/2011/05/NJComplaint.pdf>. For a conference intended to alert U.S. state supreme court justices about the ABS developments elsewhere in the world, see *The Future Is Here: Globalization and the Regulation of the Legal Profession: Recent Global Legal Practice Developments Impacting State Supreme Courts’ Regulatory Authority over the U.S. Legal Profession* (May 26–27, 2009), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/conf_materials.authcheckdam.pdf.

4. See generally Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501 (2009); Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-global Law Firms*, 28 NW. J. INT’L L. & BUS. 527 (2008).

5. See, e.g., Terry, *supra* note 3, at 1138–46.

6. Some of the additional lawyer regulatory issues that have arisen as a result of globalization and technology include foreign lawyer recognition issues, the rise (and regulation) of virtual law firms; the role of accreditation, including whether the ABA should accredit foreign law schools; and the outsourcing of legal services. A number of these issues are discussed in the “Preliminary Issues Outline” distributed by the ABA Commission on Ethics 20/20. See ABA Comm’n on Ethics 20/20, Preliminary Issues Outline (Nov. 19, 2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf. Additional detail is available in the “Issues Papers” distributed by the Commission. See generally *Priorities and Initiatives*,

examples also illustrate the fact that the practice of law is far more advanced than the regulatory world. Moreover, the issues facing the legal profession seem to be increasingly multifaceted, multidisciplinary, and complex.

Although one might talk about specific issues that have arisen because of globalization and technology, it is also possible to frame in a much broader fashion the challenges facing the legal profession and its regulators. Because lawyers around the world are subject to many of the same globalization and technology forces, similar issues now arise in multiple locations around the world. Accordingly, one can now speak of common “trends” and challenges in lawyer regulation as regulators around the world scramble to respond to similar developments.

This Article identifies six different types of challenges facing contemporary lawyer regulators and analyzes some of the regulatory trends that seem to be emerging in response to these issues. These six challenges include the following:

(1) *Who* should regulate the legal profession? For example, should there be a self-regulatory system or a co-regulatory system? Alternatively, are lawyers simply service providers, the regulation of whom should be included in general societal regulations?

(2) *Who* or *what* should be regulated? Should regulators continue to focus on regulating lawyers or should they be attempting to regulate those who provide “legal services,” whoever they happen to be?

(3) *When* should regulation occur: *ex ante* or *ex post*?

(4) *Where* should regulation occur? Our traditional system of lawyer regulation and enforcement is geography-based, but this regulatory system does not really match the reality in which legal practice is increasingly virtual.

(5) *How* should regulation occur? For example, should regulation differ depending on the size or sophistication of the client? Should a regulator use a rules-based approach or an outcomes-based approach?

(6) *Why* should regulation occur?

The *why* question of regulation is arguably the most important one of all because its answers could help shape one’s responses to the challenges listed above, as well as to specific inquiries such as whether and how to regulate ABS, ALF, virtual law offices, cloud computing, and some of the developments identified in this colloquium and elsewhere. Because of its importance, the *why* question is the subject of our companion article that appears in this colloquium.⁷ This Article, however, focuses on the six questions identified above. By illustrating these six challenges and trends,

ABA COMMISSION ON ETHICS 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/priorities_policy.html (last visited Apr. 21, 2012).

7. The authors have written a companion article for this colloquium that specifically focuses on the *why* of regulation and the need for regulatory objectives for the legal profession. See Laurel S. Terry, Steve Mark, & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012).

we hope that lawyers and their regulators in a particular country will realize that we are not alone in responding to the developments and challenges of regulating the practice of law in the twenty-first century, and that it may be worthwhile to examine the experiences of other countries to learn more about their successes and failures.

I. INSTRUMENTS OF LAWYER REGULATION

It is useful to begin with a brief discussion about the nature of lawyer regulation before examining the six current trends in lawyer regulation.

As David Wilkins noted almost two decades ago, lawyers are “regulated” by many different entities and many different sources of law and norms.⁸ These “regulators” include the traditional formal regulators who admit lawyers to practice, discipline lawyers, and adopt rules of conduct. They include those, such as state or federal legislatures, who do not necessarily have this front-line responsibility but are nevertheless formal regulators who use traditional regulatory tools such as laws and regulations. Additionally, lawyers are subject to less formal or official sources of regulation by malpractice insurance carriers, clients, the news media, judges, professional organizations, NGOs such as the American Law Institute, custom, and peer pressure, to name just a few.

Although there are many different types of regulators and many different sources of regulation, when this Article refers to “lawyer regulation,” it is referring to formal regulators who are responsible for issues related to admissions, discipline, and lawyer conduct. With this understanding, we now turn to a discussion of instruments of lawyer regulation.

Viewed from a global perspective, lawyer regulation provisions appear in many different types of regulatory instruments. For example, lawyer regulation is found in legislation, some of which may be profession-specific, such as the legal profession acts found in Canada,⁹ Australia,¹⁰ or Germany.¹¹ Additionally or alternatively, legislation applicable to lawyers may be found in legislative codes that have a broader application, such as bankruptcy statutes or criminal statutes directed against money laundering. Examples of the former kind of legislation include the U.S. bankruptcy rules applicable to lawyers counseling debtors, and examples of the latter

8. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); see also Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577 (2012) (discussing the way in which in-house counsel policies for outside counsel serve as an additional source of regulation); Symposium, *Institutional Choices in the Regulation of Lawyers*, 65 FORDHAM L. REV. 1 (1996).

9. Law Society Act, R.S.O. 1990, c. L.8 (Can.).

10. *Legal Profession Act 2004* (NSW) (Austl.).

11. Bundesrechtsanwaltsordnung [BRAO] [Federal Lawyers' Act], Aug. 1, 1959, BUNDESGESETZBLATT, Teil III [BGBL. III], last amended by Gesetz [G], Dec. 6, 2010, BGBL. I at 2515, art. 8 (Ger.) (A translation of an earlier version can be found at http://www.brak.de/w/files/02_fuer_anwaelte/brao_engl_090615.pdf).

are the U.K. rules on money laundering.¹² This type of legislation is more likely to emanate from those who are not the legal profession's primary regulators.¹³

Lawyer regulation may also appear in regulations as opposed to legislation. These regulations are often adopted pursuant to a legislative delegation. For example, in Germany, the regulatory bar association called the *Bundesrechtsanwaltskammer* [Federal Bar Association] has adopted binding regulations (the *Berufsordnung*) for the legal profession (*Rechtsanwälte*) pursuant to the authority granted to it by federal legislation known as the BRAO.¹⁴

A third method of regulation is through lawyer conduct rules, which are sometimes called ethics rules or rules of professional conduct. In some cases, the primary regulatory authority, such as state supreme courts in the United States, adopt these rules.¹⁵ In other cases, there may be several levels of delegation involved before one reaches the entity that adopts lawyer conduct rules. For example, the 2007 U.K. Legal Services Act (U.K. Act) created the Legal Services Board, which recently approved the Solicitors Regulation Authority (SRA) as a front-line regulator for solicitors in England and Wales.¹⁶ In 2011, the SRA adopted a new Handbook for Solicitors; this Handbook includes a Code of Conduct that took effect on October 6, 2011.¹⁷

A fourth method of "regulation" comes in the form of Guidelines, Guidance, Comments, or Commentary, which may or may not be binding. For example, the October 2011 Code of Conduct for English solicitors includes both rules and lengthy "guidance" provisions,¹⁸ the Law Society of

12. See, e.g., *Milavetz, Gallop & Milavetz, P.A., v. United States*, 130 S. Ct. 1324, 1330 (2010); Colin Tyre, *Anti-money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union*, 2010 J. PROF. LAW. 69, 76–78.

13. See generally John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959 (2009) (citing numerous examples of federal regulation of lawyers); Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"*, 2008 J. PROF. LAW. 189, 193–205 (describing national and international provisions that regulate lawyers as one of the many kinds of service providers).

14. See *BERUFSORDNUNG FÜR RECHTSANWÄLTE (BORA)* (Nov. 1, 2011), available at http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/bora_stand_01.11.11.pdf (English translation available at http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/bora_engl_stand_1_11_2011.pdf).

15. For links to the binding rules of conduct in U.S. states, see *Charts Comparing Professional Conduct Rules: As Adopted by States to ABA Model Rules*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/charts.html (last visited Apr. 21, 2012).

16. See, e.g., *Approved Regulators*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm (last visited Apr. 21, 2012) (listing the regulators for solicitors, barristers, legal executives, licensed conveyancers, law costs draftsmen, patent and trade mark attorneys, and notaries).

17. *SRA Handbook*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/handbook/> (last visited Apr. 21, 2012).

18. See, e.g., *Solicitors' Code of Conduct 2011, Rule 4: Confidentiality and Disclosure*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/solicitors/code-of-conduct/rule4.page> (last visited Apr. 21, 2012).

Upper Canada has “commentary” to its Code of Conduct,¹⁹ and a number of U.S. jurisdictions have adopted the comments to the ABA Model Rules of Professional Conduct and treat them as interpretative tools,²⁰ while others have refused to officially adopt the Comments (although they might reprint them).²¹

A fifth type of regulation can come in the form of regulations applicable to the entity that regulates the legal profession. For example, a law society or regulator might be subject to bylaws or other limitations, in addition to the legislation (for example, a legal profession act) that created the entity. The Law Society of Upper Canada, for example, must comply with both its bylaws and the Legal Profession Act that created the Law Society.²² Sometimes the provisions that apply to the entity can be binding, as in the case of an organization’s bylaws, but sometimes it might come in the form of “soft law” pressures on a regulatory entity.²³

A sixth source of regulation is the jurisdiction’s constitution, treaty, or foundational documents. Lawyer regulations (of any sort) that are inconsistent with the jurisdiction’s foundational law may be struck down.²⁴ This has happened on numerous occasions in the United States and in the EU.²⁵

19. See, e.g., LAW SOC’Y OF UPPER CAN., RULES OF PROF’L CONDUCT (eff. Nov. 1, 2000, rev. Nov. 22, 2011), available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=10272>.

20. See ABA, CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, SCOPE [14] (Oct. 21, 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/scope.authcheckdam.pdf> (“Many of the Comments use the term ‘should.’ Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”); ABA, CPR POLICY IMPLEMENTATION COMM., STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (May 23, 2011) [hereinafter STATE ADOPTION OF COMMENTS], available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf> (summarizing state-by-state the interpretative significance of the Comments to the Rules of Professional Conduct).

21. See, e.g., STATE ADOPTION OF COMMENTS, *supra* note 20. For example, in Maine, the Preamble, comments, and reporter’s notes are printed with the Rule, but are not part of the rules adopted by the Court. *Id.* at 4–5.

22. See *Bylaws*, LAW SOC’Y UPPER CAN., <http://www.lsuc.on.ca/with.aspx?id=1070> (last visited Apr. 21, 2012) (adopted pursuant to subsections 62 (0.1) and (1) of the Law Society Act).

23. See, e.g., Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, 2010 J. PROF. LAW. 3, 6–7, 9 (describing the ways in which the Financial Action Task Force’s non-binding recommendations have influenced binding lawyer regulation and legislation throughout the world).

24. Lawyer regulations that are inconsistent with these instruments may be struck down, depending on the nature of judicial review in the country. For example, the U.S. Supreme Court has struck down a number of lawyer regulations, finding them inconsistent with the First Amendment and other provisions of the Constitution. See generally *Cases on Lawyer Advertising*, ABA CENTER PROF. RESP., http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/clearinghouse.html (last visited Apr. 21, 2012).

25. See, e.g., *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 288 (1985) (striking down New Hampshire’s residency requirement because it was contrary to the Privileges and Immunities Clause); *Bates v. State Bar of Az.*, 433 U.S. 350, 384 (1977) (striking down Arizona’s advertising rules as violative of the First Amendment); COUNCIL OF BARS & LAW

These examples demonstrate that when one refers to “lawyer regulation,” one must keep in mind that there are many different types of instruments in which “lawyer regulation” might appear. Thus, when comparing regulation from one country to another, one must be sure to consider whether one is examining comparable instruments and approaches. Moreover, it is difficult to speak of “lawyers” as if there were a single accepted definition of that term. Some jurisdictions, such as those in the United States, use a single term to refer to a broad range of legal professionals who perform both litigation and transactional work.²⁶ Other jurisdictions, such as England and Wales, have a divided legal profession with solicitors, barristers, and numerous other kinds of legal professionals.²⁷ In some jurisdictions, the term lawyer refers only to those who appear before a court and does not include those who do transactional, advice-based work that U.S. readers might consider to be the practice of law.²⁸ Indeed, when jurisdictions want to “recognize” the rights of foreign lawyers to practice, one of the first hurdles they must overcome is determining who would be considered a lawyer in their home country.²⁹ Despite the inherent weaknesses of this Article in speaking about “global lawyers” and “global lawyer regulation,” the authors believe it is useful to highlight some of the legal profession’s regulatory developments that are presently taking place around the world.

II. SIX TRENDS

A. Who Regulates Lawyers: Self-Regulation Versus Co-Regulation

One of the most pressing issues of lawyer regulation is who should regulate lawyers. Recently, in a number of countries, authorities have examined this issue and changed who has the primary responsibility for

SOC’YS OF EUR., COURT OF JUSTICE OF THE EU JUDGMENTS CONCERNING THE LEGAL PROFESSION [hereinafter EU JUDGMENTS], *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Court_of_Justice_of_1_1302595800.pdf.

26. *See, e.g.*, Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law, N.Y. COMP. CODES R. & REGS. tit. 22, § 520 (2011).

27. *See, e.g.*, *Approved Regulators*, *supra* note 16.

28. *See* Council for Trade in Services, *Legal Services: Background Note by the Secretariat*, S/C/W/43, at 2–4 (July 6, 1998), *available at* http://www.wto.org/english/tratop_e/serv_e/w43.doc (discussing the WTO legal services classification system, the United Nations CPC classification system, and the fact that in many jurisdictions, only those who appear in court need to be licensed lawyers).

29. *See, e.g.*, Laurel S. Terry, *Preserving the Rule of Law in the 21st Century: The Importance of Infrastructure and the Need to Create a Global Lawyer Regulatory Umbrella Organization*, 2012 MICH. ST. L. REV. (forthcoming). This article suggests that an umbrella organization could help jurisdictions determine, for recognition purposes, who is a “lawyer” in their home country. For examples of instruments that identify who is a “lawyer” in another country, see Directive 98/5/EC, of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than that in Which the Qualification Was Obtained, 1998 O.J. (L 77) 36, at arts. (1)–(2); *see also Professions Approved by the SRA for RFL Status*, SOLIC. REG. AUTHORITY (July 21, 2011), <http://www.sra.org.uk/sra/regulatory-framework/professions-approved-by-SRA-for-RFL-status.page>.

regulating lawyers. One of the most common ways to describe some of the differences in approach is to contrast a “self-regulatory” approach with the concept of “co-regulation.”

Much has been written and could be written about what it means to be a “profession.”³⁰ Terence Johnson, for example, described many different theories of professionalism and concluded that “[a] profession is not, then, an occupation but a means of controlling an occupation.”³¹ Professions traditionally are viewed as having a shared body of knowledge often imparted in an institutional setting that certifies competence and quality.³² Moreover, entry into professions is conditioned upon the demonstration of sufficient skill in applying the core knowledge, and professions self-regulate to ensure competent and ethical performance.³³ Entry into professions may also be conditioned upon the performance of public service.³⁴ Richard Abel has described professions in somewhat different terms, citing attributes such as the profession’s control over entry, control over the market, the creation of demand, and professional associations.³⁵ Whatever definition is used, however, it is clear that “lawyers” are among the groups that traditionally have been viewed as a “profession.”

The legal profession, similar to other professions, has traditionally played a large, if not exclusive, role in regulating itself.³⁶ The traditional view is that the legal profession is a “self-regulated” profession.³⁷ Indeed, as noted

30. See generally TERENCE J. JOHNSON, PROFESSIONS AND POWER (1972); PROFESSIONAL COMPETITION AND PROFESSIONAL POWER (Yves Dezalay & David Sugarman eds., 1995); PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA (Gerald L. Geison ed., 1983) [hereinafter PROFESSIONS AND PROFESSIONAL IDEOLOGIES].

31. JOHNSON, *supra* note 30, at 45.

32. See, e.g., Nancy Welsh, *Institutionalization and Professionalization*, in THE HANDBOOK OF DISPUTE RESOLUTION 487, 494 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (citing ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988)); PROFESSIONS AND PROFESSIONAL IDEOLOGIES, *supra* note 30.

33. Welsh, *supra* note 32, at 494; PROFESSIONS AND PROFESSIONAL IDEOLOGIES, *supra* note 30.

34. Steve Mark, Legal Servs. Comm’r, N.S.W. Office of the Legal Servs. Comm’r, Keynote Address at the Australian Academy of Law Symposium 2008: Re-imaging Lawyering: Whither the Profession? 4 (July 25, 2008), available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/AALS_Keynoteaddress_July08.doc/\\$file/AALS_Keynoteaddress_July08.doc](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/AALS_Keynoteaddress_July08.doc/$file/AALS_Keynoteaddress_July08.doc).

35. 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD 123–85 (Richard L. Abel & Philip S. C. Lewis eds., 1988); see also Richard L. Abel, *Lawyers in the Civil Law World*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 1, 8–9 (Richard L. Abel & Philip S. C. Lewis eds., 1988) (noting that many theoretical works have been informed by the framework set by critical sociology and economics, including works by Larson and Freidson).

36. See generally Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425 (2008); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, 14 LAW & SOC. INQUIRY 677 (1989), reprinted in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95 (Robert L. Nelson et al. eds., 1992).

37. See, e.g., Paul D. Paton, *Between a Rock and a Hard Place: The Future of Self-Regulation—Canada Between the United States and the English/Australian Experience*, 2008 J. PROF. LAW. 87, 87–88.

below, many lawyers around the world still describe the profession in this fashion.³⁸ Before turning to the recent changes, however, it is worth noting that the term “self-regulation” can be misleading—both empirically and because the term “self-regulation” is ambiguous and means different things to different people.

On the empirical side, the groundbreaking *Lawyers in Society* book series edited by Richard Abel and Philip Lewis demonstrates the many different ways that lawyers are regulated.³⁹ While many different countries use many different models of regulations, there are few if any countries where lawyers are completely self-regulated without any oversight, direction, or limits from other sources such as the executive, legislative, or judicial branches of government.⁴⁰ Thus, despite the fact that it has become common to speak of the relatively recent trend from legal profession self-regulation to co-regulation,⁴¹ it is important to realize that for decades, if not centuries, the legal profession has not been entirely self-regulated.

The traditional view of “self-regulation” is also misleading because of the ambiguity of the term. Consider for example, some of the differing ways that lawyers from the United States, Canada, and the United Kingdom—which are all English-speaking, common-law based jurisdictions—interpret the term “self-regulation.” In the United States, it is common to hear lawyers speak of their “self-regulatory” system. If asked to explain, they often will respond that the system is self-regulatory because the judicial branch of government, rather than the executive or legislative branch, primarily regulates U.S. lawyers.⁴² Paul Paton has written that the Canadian legal profession has more “self-regulation” than that of the United States, United Kingdom, or Australia, because Canadian lawyers are primarily regulated by their law societies, which are composed of lawyers.⁴³ Some U.S. commentators might disagree, however, because the authority of the Canadian law societies is based on legal profession acts

38. See *infra* notes 43–45 and accompanying text.

39. See *infra* notes 43–45 and accompanying text; see also *APEC Legal Services Initiative Inventory*, ASIA-PAC. ECON. COOPERATION, <http://www.legalservices.apec.org/inventory/index.html> (last visited Apr. 21, 2012); *ELIXIR*, <http://elixir.bham.ac.uk/menu/country/default.htm> (last visited Apr. 21, 2012) (funded by the European Commission, this website collects information about lawyer regulation); *Legal Professions*, EUR. E-JUST. PORTAL, https://e-justice.europa.eu/content_legal_professions-29-en.do (last visited Apr. 21, 2012).

40. See *supra* notes 8–29 and accompanying text.

41. See, e.g., Andrew Boon, *Professionalism Under the Legal Services Act 2007*, 17 INT’L J. LEGAL PROF. 195, 195 (2010) (noting that the decline of professional control and privilege coincides with economic and social change, including the drive of the capitalist state toward consumerism and commodification).

42. Cf. ABA COMM’N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201A TO THE HOUSE OF DELEGATES (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201a.authcheckdam.pdf>. This recommendation, which was adopted as MJP Recommendation #1, states: “RESOLVED, that the American Bar Association affirms its support for the principle of state judicial regulation of the practice of law.” *Id.*

43. See Paton, *supra* note 37, at 116–18.

enacted by the Canadian provincial and territorial legislatures.⁴⁴ A number of European lawyers do not consider a system to be self-regulatory unless lawyers are regulated by their bar association; as a result, they view the court-based U.S. system as something other than self-regulation. In short, different individuals from different cultures will view “self-regulation” very differently.

Although definitions vary, this Article can point to a number of high-profile examples of movement away from self-regulation and toward co-regulation. For example, Australia, the United Kingdom, and Scotland have all adopted a co-regulatory approach.⁴⁵ In each jurisdiction, oversight authority is placed in an alternate body. In the United Kingdom and Scotland, a regulatory board with a nonlawyer majority and a nonlawyer chair maintains oversight.⁴⁶ In Australia, regulatory oversight is largely placed with statutory bodies such as Commissions or Boards.⁴⁷ As Australia moves closer toward establishing a national regulatory system, oversight will be solidified by the creation of a proposed national legal services board that would include nonlawyer members and a National Legal Services Commissioner who may or may not be a lawyer.⁴⁸ Another example of this trend is an article from this colloquium that calls for movement toward a co-regulatory system.⁴⁹

When speaking about the question of “who regulates,” it is worth noting that to the extent the legal profession is involved in the regulation, there is increased interest in ensuring that it is a regulatory entity rather than a representational entity that is involved in regulation. Thus, for example, antitrust authorities in a number of jurisdictions have been interested in

44. See, e.g., Legal Profession Act, S.B.C. 1998, c. 9 (Can.). For additional information about the Canadian legal profession acts, see Terry, Mark, & Gordon, *supra* note 7, at 2703–07.

45. See generally *Legal Profession Act 2004* (NSW) (Austl.); Legal Services Act, 2007, c. 29 (U.K.); Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1; COUNCIL OF AUSTRALIAN GOV'TS, NATIONAL LEGAL PROFESSION REFORM, DRAFT LEGAL PROFESSION NATIONAL LAW (May 31, 2011) [hereinafter COAG DRAFT NATIONAL LAW], available at [http://www.ipc.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/vwFiles/Legal_Profession_National_Law.pdf/\\$file/Legal_Profession_National_Law.pdf](http://www.ipc.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/vwFiles/Legal_Profession_National_Law.pdf/$file/Legal_Profession_National_Law.pdf). For additional information, see Terry, Mark, & Gordon, *supra* note 7, at 2712 n.137.

46. Legal Services Act, 2007, c. 29, pts. 2–11 (U.K.).

47. For example, in New South Wales, the Legal Services Commissioner co-regulates the legal profession together with the Law Society and the Bar Association. See *About Us*, N.S.W. OFF. LEGAL SERVICES COMMISSIONER, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_aboutus [hereinafter *N.S.W. About Us*] (last visited Apr. 21, 2012). The same is true in Queensland. See *Our People and Organisational Structure*, LEGAL SERVICES COMMISSION, <http://www.lsc.qld.gov.au/about-the-commission/our-people-and-organisational-structure> (last visited Apr. 21, 2012). Finally, in Victoria, the legal profession is regulated by the Legal Services Commissioner, together with the Legal Services Board, the Law Institute of Victoria, and the Bar Association. See *About Us*, LEGAL SERVICES COMMISSIONER, <http://www.lsc.vic.gov.au/cms.php?user=legalservicesvic;doc=Home;page=;pageID=193> (last visited Apr. 21, 2012).

48. See COAG DRAFT NATIONAL LAW, *supra* note 45.

49. See Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761 (2012).

making sure that the “regulatory” and “representation” arms of professional associations are separate.⁵⁰ This is one of the reasons why, in the United Kingdom, the Solicitors Regulation Authority and the Bar Standards Board were created; their creation ensured that the regulatory bodies would be separate from the Law Society of England and Wales and the Bar Council, which are the representational entities.⁵¹

In addition to the move from a more self-regulatory system toward a co-regulatory system, the legal profession increasingly is regulated by others who are not part of a co-regulatory system.⁵² Sometimes these regulators take a very different approach than has traditionally been used to regulate the legal profession.⁵³ This development has been referred to as the new “Service Providers” paradigm.⁵⁴ For example, governments around the world are interested in harnessing the power of the legal profession in their fight against money laundering and terrorism. Many countries have adopted or endorsed recommendations that require lawyers to report suspicious activity by the lawyers’ own clients and to do so without notifying the client.⁵⁵ These recommendations, which some countries have implemented, are at odds with the lawyer-confidentiality rules in many countries.⁵⁶ Government antitrust authorities, who are increasingly

50. See generally COUNCIL OF BARS & LAW SOC’YS OF EUR., CCBE POSITION ON REGULATORY AND REPRESENTATIVE FUNCTIONS OF BARS (June 2005), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf; Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT’L L. & BUS. 1 (2009) (discussing EU, OECD, and Canadian reports that focused on this issue).

51. See, e.g., BAR STANDARDS BD., THE LEGAL SERVICES ACT 2007: IMPLICATIONS FOR THE REGULATION OF THE BAR IN ENGLAND AND WALES CONSULTATION PAPER 1 (Feb. 2008), available at http://www.barstandardsboard.org.uk/media/1390704/legal_services_act_2007_regulation_implications.pdf (“This consultation paper is issued by the Bar Standards Board The Board was established in January 2006 to regulate in the public interest.”); *About Us*, B. COUNCIL, <http://www.barcouncil.org.uk/about-us> (last visited Apr. 21, 2012) (“The Bar Council represents barristers in England and Wales.”); *How We Work*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/sra/how-we-work.page> (last visited Apr. 21, 2012); *LAW SOC’Y ENG. & WALES*, <http://www.lawsociety.org.uk/home.law> (last visited Apr. 21, 2012); *What We Do*, B. STANDARDS BOARD, <http://www.barstandardsboard.org.uk/about-bar-standards-board/what-we-do/> (last visited Apr. 21, 2012) (“We regulate barristers called to the Bar in England and Wales in the public interest.”).

52. See generally Renee Newman Knake, *The Supreme Court’s Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499 (2010) (discussing the Supreme Court’s 2009 term, which included approximately thirteen cases raising issues relevant to lawyer regulation); Leubsdorf, *supra* note 13 (citing numerous examples of federal regulation of lawyers).

53. See, e.g., Terry, *supra* note 23, at 10 (summarizing FATF developments).

54. See Terry, *supra* note 13, at 189–93.

55. See Terry, *supra* note 23, at 24–27 (summarizing IBA data about country implementation of the FATF recommendations); see also Laurel Terry, *Transformative Law: The Impact of International Law on Lawyer Regulation: A Case Study Focusing on the Financial Action Task Force (FATF) and Its 2008 Lawyer Guidance* (Jan. 8, 2010), http://www.personal.psu.edu/faculty/l/s/1st3/presentations%20for%20webpage/Terry_FATF_AALS_%202010.pdf (slides presented at AALS Annual Meeting).

56. Countries that are grappling with the impact of the FATF recommendations on the legal profession include, inter alia, Australia, Canada, the United States, and the United Kingdom. See, e.g., *Anti-money Laundering*, LAW SOC’Y ENG. & WALES,

interested in scrutinizing lawyer regulation, provide another example of such non-traditional regulators.⁵⁷

Although this Article does not examine in-depth the regulatory system in every jurisdiction in the world, we submit that “self-regulation” and independence have been a fundamental part of lawyers’ self-identity for many decades, if not centuries. Consider, for example, some of the resolutions of the International Bar Association (IBA), which is one of two general-purpose global bar associations that regularly address lawyer regulation issues.⁵⁸ The IBA Council represents more than 200 bar associations and law societies.⁵⁹ In 1998, the IBA adopted what has come to be known as its “core values” resolution. This resolution sets forth the attributes that members should ensure were not compromised by the ongoing World Trade Organization negotiations, including the need for “an independent legal profession.”⁶⁰ The IBA’s 2006 General Principles of the

<http://www.lawsociety.org.uk/productsandservices/antimoneylaundering.page> (last updated Feb. 23, 2012); *Anti-Money Laundering: Information for the Profession*, LAW COUNCIL AUSTR., <http://www.lawcouncil.asn.au/information/for-the-profession/aml.cfm> (last visited Apr. 21, 2012); *Model Rules to Fight Money Laundering and Terrorist Financing*, FED’N L. SOCIETIES CAN., <http://www.flsc.ca/en/model-rules-to-fight-money-laundering-and-terrorist-financing/> (last visited Apr. 21, 2012); *Money Laundering*, U.S. DEPT. TREASURY, <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/Money-Laundering.aspx> (last visited Apr. 21, 2012); *Task Force on Gatekeeper Regulation and the Profession*, ABA, http://www.americanbar.org/groups/criminal_justice/pages/TaskForce.html (last visited Apr. 21, 2012). For additional information, see the FATF Symposium which is reprinted on the Anti-Money Laundering Forum of the International Bar Association (IBA) website. *2010 FATF Symposium*, IBA ANTI-MONEY LAUNDERING F., http://www.anti-moneylaundering.org/2010_FATF_Symposium.aspx (last visited Apr. 21, 2012). The symposium included articles about FATF implementation in Canada, the EU, the United Kingdom, and a number of developing countries. *See id.*

57. *See* OECD, COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS 11–12 (2007), available at <http://www.oecd.org/dataoecd/12/38/40080343.pdf>. This report built on the work of a prior report that addressed professional services in general, rather than legal services specifically. *See* OECD, COMPETITION IN PROFESSIONAL SERVICES 2 (1999), available at <http://www.oecd.org/dataoecd/35/4/1920231.pdf>. For additional information, see Terry, *supra* note 50, at 4–10; Laurel S. Terry, EU Competition Developments (Apr. 17, 2008), http://www.personal.psu.edu/faculty/l/s/lst3/presentations_for_webpage/Terry_EU_Competition_Georgetown.pdf.

58. *See, e.g.,* Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO’s Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 PENN ST. INT’L L. REV. 695, 714–21 (2004) (describing various IBA resolutions and the IBA’s role vis-à-vis the World Trade Organization).

59. *About the IBA*, INT’L B. ASS’N, http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx (last visited Apr. 21, 2012).

60. *See* IBA Resolution on Deregulating the Legal Profession 1 (1998), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=4094F728-9035-4C6C-8AB6-DE645546D26C>. This resolution stated:

[T]he Council of the International Bar Association, considering that the legal profession nevertheless fulfils a special function in society, distinguishing it from other service providers, in particular with regard to:

- its role in facilitating the administration of and guaranteeing access to, justice and upholding the rule of law,
- its duty to keep client matters confidential,
- its duty to avoid conflicts of interest,
- the upholding of general and specific ethical and professional standards,

Legal Profession began by citing the importance of the independence of the legal profession.⁶¹ In a similar vein, the first principle found in the 2006 Charter of Core Principles of the European Legal Profession is independence and the ninth and last principle is “the self-regulation of the legal profession.”⁶² Even the United Nations’ Statement on Basic Principles on the Role of Lawyers includes principles that arguably endorse certain aspects of self-regulation.⁶³ Similar sentiments of independence are

· its duty, in the public interest, of securing its independence, professionally, politically and economically, from any influence affecting its service,

· its duty to the Courts

HEREBY RESOLVES

1 that the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society and

2 that any steps taken with a view to deregulating the legal profession should respect and observe the principles outlined above.

Id. at 1.

61. INT’L B. ASS’N, IBA GENERAL PRINCIPLES FOR THE LEGAL PROFESSION 1 (Sept. 20, 2006), *available at* <http://www.ibanet.org/Document/Default.aspx?DocumentUid=E067863F-8F42-41D8-9F48-D813F25F793C> (“A lawyer shall maintain and be afforded protection of independence to allow him or her to give his or her clients unbiased advice or representation. A lawyer shall exercise his or her independent, unbiased professional judgment upon advising his or her client as to the likelihood of success of the client’s case and upon the client’s representation.”).

62. *See* COUNCIL OF BARS & LAW SOC’YS OF EUR., CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS 4 (2010), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf.

63. *See* Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, at 118, U.N. Doc. A/CONF.144/28/Rev.1 (1990). These Principles include the following:

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers. . . .

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference. . . .

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms. . . .

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

Id. at 119–23.

also found in the Turin Principles of Professional Conduct for the Legal Profession in the 21st Century of the Union Internationale Des Avocats, and in the Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals drafted by the International Law Association.⁶⁴

While self-regulation arguably has been a part of the lawyer's self identity in many countries, the legal profession has also been aware of historic as well as recent challenges to that concept. As John Flood has written, "When we look at the histories of professions, their existence seems to be one of tension and struggle with the state. Are they monopolies? Are their practices in the public interest? Do they extract rents? Should they self-regulate?"⁶⁵ These issues have been debated over the years, but perhaps for the legal profession never as vigorously as within the last decade.⁶⁶ Thus, one of the six trends identified in this Article is the global focus on the question of who should regulate lawyers.

B. What (and Whom) Is Regulated

Another important issue facing lawyers, their regulators, and the public is who and/or what should be regulated. Should regulators be regulating lawyers or "legal work"? A regulator might see its primary obligation as the regulation of certain licensed individuals or entities. For example, the the Solicitors Regulation Authority sees its role as regulating solicitors and the firms in which they work, but not barristers or other types of legal professionals unless they are part of a solicitor's firm.⁶⁷ Alternatively, a regulator might see its role as regulating "legal work." In Australia, for example, laws regulating the legal profession in the states and territories prohibit a person from "engaging in legal practice" for a fee or reward when they are not entitled to do so.⁶⁸ The law does not define what it means by

64. See, e.g., INT'L LAW ASS'N, THE HAGUE PRINCIPLES ON ETHICAL STANDARDS FOR COUNSEL APPEARING BEFORE INTERNATIONAL COURTS AND TRIBUNALS 3 (Sept. 27, 2010), available at <http://www.ila-hq.org/download.cfm/docid/90B50C71-23D6-4366-B5E488C89D96559A>; UNION INTERNATIONALE DES AVOCATS, TURIN PRINCIPLES OF PROFESSIONAL CONDUCT FOR THE LEGAL PROFESSION IN THE 21ST CENTURY 3 (Oct. 27, 2002), available at <http://www.uianet.org/documents/qquia/resolutions/Professional%20Conduct%20for%20the%20Legal%20Profession%20in%20the%2021st.pdf>.

65. John Flood, *Reclaiming Professional Identity*, JOHN FLOOD'S RANDOM ACAD. THOUGHTS (Dec. 1, 2009, 5:36 PM), <http://johnflood.blogspot.com/2009/12/reclaiming-professional-identity.html>.

66. See generally Terry, *supra* note 50; see also Terry, Mark, & Gordon, *supra* note 7, at 2691–94 nn.19–37 and accompanying text (citing studies).

67. See generally FAQs: *Legal Services Act and ABSs*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/sra/legal-services-act/faqs/faqs.page> (last visited Apr. 21, 2012). Entity-based regulation began in July 2010.

68. Section 14 of the N.S.W. *Legal Profession Act 2004* provides as follows:

14 Prohibition on engaging in legal practice when not entitled

(1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.

Maximum penalty: 200 penalty units.

(2) Subsection (1) does not apply to engaging in legal practice of the following kinds:

“engaging in legal practice.” The concept of regulating “legal work” rather than lawyers has always been fraught with difficulty for regulators. Today nonlawyers are able to perform tasks that were traditionally reserved for lawyers, creating confusion in the marketplace and difficulty for legal regulators. In Australia, the move to allow the incorporation of legal practices permits regulators to oversee multidisciplinary practices, including nonlawyers (such as accountants, real estate agents, and financial planners), where at least one legal practitioner-director must be appointed to take responsibility for ensuring that the practice as a whole is compliant with the requirements of the legislation regulating lawyers.⁶⁹ This can be

(a) legal practice engaged in under the authority of a law of this jurisdiction or of the Commonwealth,

(b) legal practice engaged in by an incorporated legal practice in accordance with Part 2.6 (Incorporated legal practices and multi-disciplinary partnerships),

(c) the practice of foreign law by an Australian-registered foreign lawyer in accordance with Part 2.7 (Legal practice by foreign lawyers),

(d) legal practice engaged in by a complying community legal centre,

(e) conveyancing work carried out in accordance with a licence in force under the *Conveyancers Licensing Act 2003*,

(f) (Repealed)

(g) the drawing of instruments by an officer or employee in the service of the Crown (including the Public Service) in the course of his or her duty,

(h) legal practice of a kind prescribed by the regulations.

(3) Subsection (1) does not apply to:

(a) a person who as an employee provides legal services to his or her employer or a related entity if he or she:

(i) so acts in the ordinary course of his or her employment, and

(ii) receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee, or

(b) a person or class of persons declared by the regulations to be exempt from the operation of subsection (1).

(4) A person is not entitled to recover any amount in respect of anything the person did in contravention of subsection (1) and must repay any amount so received to the person from whom it was received.

(5) A person may recover from another person, as a debt due to the person, any amount the person paid to the other person in respect of anything the other person did in contravention of subsection (1).

(6) The regulations may make provision for or with respect to the application (with or without specified modifications) of provisions of this Act to persons engaged in legal practice of a kind referred to in subsection (2) (other than subsection (2) (b)–

(f)) or persons referred to in subsection (3).

Legal Profession Act 2004 (NSW) s 14 (Austl.).

69. Since July 1, 2001, New South Wales legal service providers have been permitted to incorporate and provide legal services to clients either alone, or alongside other service providers who may, or may not be, legal practitioners. Such Incorporated Legal Practices (ILP) can operate, provided the ILP has at least one legal practitioner director and complies with the requirements of the Legal Profession Amendment (Incorporated Legal Practices) Act 2000 and the Legal Profession Regulation 2005. Such provisions have been incorporated into the Legal Profession Act 2004 and Regulations. See *Legal Profession Act 2004* (NSW) s 140. Legal practitioner-directors must also comply with their obligations as a company director under the Corporations Act 2001. See *id.* s 140(6). Similar legislation exists in other states and territories in Australia. See, e.g., *Legal Profession Act 2006* (ACT) pt 2.6; *Legal Profession Act 2006* (NT) pt 2.6; *Legal Profession Act 2007* (Qld) pt 2.7; *Legal Profession Act 2007* (Tas) pt 2.5; *Legal Profession Act 2004* (Vic) pt 2.7; *Legal Practice Act 2003* (WA) ss 45–74. All of these jurisdictions have identical legislation to that in New

seen as a small step toward the regulation broadly of “legal work” rather than specifically of lawyers.⁷⁰

When evaluating what the regulator seeks to regulate—individuals or services—one must take cognizance of the impact of the lawyer monopoly or unauthorized practice of law (UPL) rules in the jurisdiction. If a jurisdiction has a narrow monopoly, its regulators may seek to regulate far fewer activities (or individuals) than a jurisdiction that has a broader definition of the lawyer’s monopoly. For example, England and Wales have a fairly narrow list of things they consider to be “reserved tasks” or falling within the solicitor’s monopoly.⁷¹ Consequently, the *who* and *what* of regulation in England and Wales is fairly narrow.

The situation in the United States is considerably different. Because the U.S. concept of UPL is much broader than in the United Kingdom, the United States regulates more broadly with respect to who and what. As a result, one sees UPL lawsuits in the United States that one would not see in the United Kingdom, including lawsuits against publishers and against websites offering form preparation.⁷² But regardless of whether a jurisdiction defines the monopoly broadly or narrowly, so long as it regulates providers rather than services and there is a monopoly, the regulator will have to grapple with UPL issues.

The Law Society of Upper Canada provides an example of a regulator that seems interested in regulating legal services as well as lawyers. Accordingly, it has now brought paralegals under its regulatory ambit.⁷³

Even if a regulator decides to regulate providers, rather than services, it must decide whether to regulate entities as well as individuals. For example, other than New York and New Jersey, which discipline law firms and individual lawyers, U.S. states only regulate individual lawyers.⁷⁴ The U.K. SRA, on the other hand, regulates entities.⁷⁵

South Wales permitting incorporation, and have adopted the same self-assessment program designed and introduced there.

70. Steve Mark, “What Is Legal Work?—A Regulator’s View” (Mar. 20–24, 2005), available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/What%20is%20Legal%20Work%20LawAsia%20Paper.doc/\\$file/What%20is%20Legal%20Work%20LawAsia%20Paper.doc](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/What%20is%20Legal%20Work%20LawAsia%20Paper.doc/$file/What%20is%20Legal%20Work%20LawAsia%20Paper.doc) (paper presented at the LAWASIAdownunder2005 Conference).

71. See Legal Services Act, 2007, c. 29, § 12 (U.K.) (meaning of “reserved legal activity” and “legal activity”).

72. See, e.g., *Unauthorized Practice of Law Comm. v. Parsons Tech. Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (vacating the District Court’s injunction banning Quicken Family Lawyer after the Texas Legislature amended its 1939 unauthorized practice of law statute); Karen McMahan, *State Bar Claims LegalZoom Practices Law Without a License: Online Document Provider Says Bar Is Blocking Its Business Illegally*, CAROLINA J. ONLINE (Nov. 21, 2011), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=8498.

73. See *Resources for Paralegals*, LAW SOC’Y UPPER CAN., <http://rc.lsuc.on.ca/jsp/home/paralegalindex.jsp> (last visited Apr. 21, 2012).

74. See, e.g., N.Y. RULES OF PROF’L CONDUCT R. 8.4 (2011) (“Misconduct, A lawyer or law firm shall not”); N.J. RULES OF PROF’L CONDUCT R. 5.1 (2011) (“Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization’s work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.”); N.J. Ct. R. 1:20-1(a) (“Every attorney and business entity authorized to practice law in the State of New

An additional question that regulators now face is how to define their regulatory authority in a world in which lawyers are increasingly seen as “consultants,” and nonlawyers are consulted on issues that might be viewed as legal services.⁷⁶ As Jordan Furlong has pointed out, legal regulators are increasingly going to have to grapple with this question of who and what they regulate.⁷⁷ The question whether they are regulating individuals or services was less important in the past because there was a more perfect overlap between lawyers and legal services. Legal services were what lawyers provided. Today, however, there is much less overlap; lawyers no longer dominate the “legal services” market the way they once did.⁷⁸ The legal profession is no longer the “only game in town,” so regulators now must consider whether and how to respond to nonlawyer, nontraditional legal services providers. Should regulators try to regulate paralegals, software providers such as Intuit (Willmaker), and internet sites such as LegalZoom? The issue of who or what should be regulated is one that many regulators have faced, or will face, regardless of their location.

C. When Lawyers Are Regulated: Ex Ante Versus Ex Post

A third development in the field of lawyer regulation has to do with timing and the point at which regulators should become involved with lawyers. The traditional approach to lawyer regulation and enforcement is to wait until a lawyer violates a regulatory provision and then impose some sort of penalty.⁷⁹ In the United States, disciplinary authorities typically wait until a lawyer violates (or is alleged to have violated) a rule of professional conduct before stepping in.⁸⁰ At that point, it is not

Jersey, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3.”).

75. See *supra* note 67 and accompanying text.

76. See, e.g., Robert Eli Rosen, “We’re All Consultants Now”: *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 640 (2002); Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397, 1398 (2006).

77. See, e.g., Jordan Furlong, *Transformation: Five Catalysts at Work in the Canadian Legal Services Marketplace*, 2010 Semi-annual Conference Federation of Law Societies of Canada, at 7 (Mar. 19, 2010) (on file with the Fordham Law Review).

78. *Id.* at 3. As Mr. Furlong advised Canadian regulators, they will have to decide whether they are regulating the current providers or whether they want to regulate the legal services market. Some Canadian provincial regulators have extended their regulatory reach beyond lawyers. *Id.* at 7–8. The Law Society of Upper Canada, for example, regulates paralegals as well as lawyers. See *id.* at 8; *Resources for Paralegals*, *supra* note 73. Not all Canadian provinces or territories have taken this approach, however.

79. See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 9(1) (2002) (“It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the [State Rules of Professional Conduct], or any other rules of this jurisdiction regarding professional conduct of lawyers; (2) engage in conduct violating applicable rules of professional conduct of another jurisdiction . . .”).

80. See, e.g., *id.*; Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 2008 J. PROF. LAW. 359, 379–81; Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53, 58–59.

uncommon for U.S. disciplinary authorities to impose requirements that are intended to be proscriptive and help the lawyer avoid future mistakes.⁸¹ Although there is some ex ante regulation in the United States, such as random trust account audits and mandatory continuing legal education requirements, U.S. regulators do not generally intervene until a disciplinary violation occurs.

In contrast to this primarily ex post approach to lawyer regulation, some regulators, in an effort to prevent lawyer mistakes and misconduct, are increasingly turning to ex ante regulation and enforcement. For example, several Australian states and territories now rely extensively on this type of ex ante approach. The New South Wales Legal Profession Act 2004 requires that legal practitioner-directors ensure the incorporated practice has “appropriate management systems” to render the practice compliant with the Act.⁸² The Office of the Legal Services Commissioner (OLSC) has used this “appropriate management systems” concept to develop an ex ante approach to regulation. After consultation with various stakeholders, the OLSC developed a list of ten objectives that an “appropriate management system” should address.⁸³ The OLSC requires that each incorporated practice conduct a “self-assessment” to determine its level of compliance with these objectives.⁸⁴ For each of these objectives, the OLSC has developed guidelines. For example, objective five relates to costs disclosure and billing.⁸⁵ The self-assessment form identifies key concepts that practitioners might want to consider when determining their compliance with objective five. The key concepts include:

The use of established new client engagement procedures including universal use of approved retainer/costs agreements.

Standardised procedures for collecting client data, opening of new files and the recording of data within the firm’s accounting and practice management systems with provision for separate client records in the case of multi-disciplinary practices.⁸⁶

The self-assessment document then provides additional examples of what an incorporated legal practice (ILP) may do to demonstrate compliance. For example, the self-assessment form suggests practitioners may want to use a “disclosure policy (e.g. whether or not taking advantage of exceptions to disclosure, policy about disclosure of costs of non-legal services used in the legal matter) with a process ensuring disclosure is made in accordance

81. See, e.g., Nancy McCarthy, *Lawyers Go Back to School to Brush Up on Their Ethical Duties*, CAL. B.J. (May 2011), <http://www.calbarjournal.com/May2011/TopHeadlines/TH2.aspx>. See generally Maute, *supra* note 80.

82. *Legal Profession Act 2004* (NSW) s 140(3) (Austl.).

83. OFFICE OF THE LEGAL SERVS. COMM’R, CONCERNING THE ELEMENTS OF “APPROPRIATE MANAGEMENT SYSTEMS” FOR INCORPORATED LEGAL PRACTICES IN NSW [hereinafter SELF-ASSESSMENT DOCUMENT], available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/ILP%20self%20assessment%20form.doc/\\$file/ILP%20self%20assessment%20form.doc](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/ILP%20self%20assessment%20form.doc/$file/ILP%20self%20assessment%20form.doc).

84. *Id.*

85. *Id.* at 6–7; see also *Legal Profession Act 2004* (NSW) s 140(3).

86. See SELF-ASSESSMENT DOCUMENT, *supra* note 83, at 6–7.

with the Act, Rules and Regulation.”⁸⁷ The self-assessment document also suggests “[a]n up to date File/Matter Register or Practice Management system listing files and individual client files.”⁸⁸ Queensland’s approach is identical.⁸⁹

The impetus for creating this framework derives from OLSC’s philosophical stance that their function and the purpose of regulating legal practitioners is to reduce complaints against lawyers within a paradigm of consumer protection and protection of the rule of law.⁹⁰ To this end, the OLSC has adopted an “education towards compliance” framework to work with the profession rather than against them in entrenching an ethical culture and promoting professionalism, while reducing complaints. So, when the OLSC receives a complaint against a lawyer, their first response, where possible and appropriate, is not to prosecute the lawyer but to work with him or her to determine the underlying basis of the complaint.

The switch to an ex ante approach has produced impressive results. In New South Wales, ILPs experienced a sharp drop in complaints against them after implementation of the proactive “appropriate management systems” approach.⁹¹ The experience in Queensland was similar.⁹²

The Australian experiences are one reason why there has been global interest in proscriptive, or ex ante, systems of lawyer regulation and enforcement and why Australian regulators regularly are asked to share their experiences with others.⁹³ For example, some members of the ABA

87. *Id.*

88. *Id.* at 6.

89. See LEGAL SERVS. COMM’N, INCORPORATED LEGAL PRACTICES SELF ASSESSMENT AUDIT, available at http://www.lsc.qld.gov.au/__data/assets/pdf_file/0005/97781/ilp-initial-self-assessment-audit-form.pdf.

90. Steve Mark, *Regulation for Professionalism*, WITHOUT PREJUDICE, (N.S.W. Office of the Legal Servs. Comm’r, Sydney, Austl.), June 2010, at 1, available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/WP_Issue50_June2010.pdf/\\$file/WP_Issue50_June2010.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/WP_Issue50_June2010.pdf/$file/WP_Issue50_June2010.pdf).

91. A 2008 study by the OLSC and Dr. Christine Parker, of the University of Melbourne, showed that on average, the complaint rate (average number of complaints per practitioner per years) for ILPs after self-assessment was two thirds lower than the complaint rate before self-assessment. See Christine Parker, Tahlia Gordon, & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & Soc. 466, 485 (2010).

92. See John Briton & Scott McLean, *Lawyer Regulation, Consciousness-Raising and Social Science* 10–11 (July 15–17, 2010), available at http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/106069/lawyer-reg-consciousness-raising-and-social-science.pdf (paper presented at International Legal Ethics Conference IV, Stanford Law School).

93. For examples of the many places in which Australian regulators have been asked to share their experiences with others, see STEVE MARK, N.S.W. OFF. LEGAL SERVICES COMMISSIONER, *REGULATING FOR PROFESSIONALISM: THE NEW SOUTH WALES APPROACH AND KEEPING PACE WITH THE EVOLVING PRACTICE OF LAW* (Sept. 5, 2010), available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Regulating_for_Professionalism_ABA_Conference_August2010.pdf/\\$file/Regulating_for_Professionalism_ABA_Conference_August2010.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Regulating_for_Professionalism_ABA_Conference_August2010.pdf/$file/Regulating_for_Professionalism_ABA_Conference_August2010.pdf); Briton and McLean, *supra* note 92; Steve Mark, *Before and After*, LAW MGMT., Nov. 2010, at 30, 30–31, available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Law_Mgt_Mag_article.pdf/\\$file/Law_Mgt_Mag_article.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Law_Mgt_Mag_article.pdf/$file/Law_Mgt_Mag_article.pdf); Steve Mark et al., *Preserving the Ethics and Integrity of the Legal Profession in an Evolving*

Commission on Ethics 20/20 have seemed interested in the issue of whether the United States should move toward a more proscriptive system of lawyer regulation. Thus, the question of when to regulate is one that regulators are frequently asked to address.

D. Where Lawyers Are Regulated: Geographically Versus Virtually

In addition to the *who-what-when* issues noted above, lawyer regulators increasingly face questions about where activities occur and which activities fall within their regulatory jurisdiction. These are particularly difficult issues because the legal profession seems to be in the midst of a Copernican revolution.

Historically, the legal profession and its regulators were defined by geography. Lawyers practiced in one geographic area, and the regulators with jurisdiction over those lawyers were located in the same geographic area. As technology developed, lawyers were no longer confined to a single area, and regulators expanded their authority with them. Today, even though the legal profession is no longer bound by geography, the regulatory system is still primarily defined by geography because the primary regulators are associated with a specific geographic political entity. The size of the geographic political entity may vary, but geography is a defining trait. Thus, the United States, Canada, and Australia all have subnational regulators designated by states, provinces, or territories, whereas the legal professions in other jurisdictions may be regulated on a national or more local basis.⁹⁴ Although there is some thematic admission and regulation (for example, admission to practice before the International Criminal Court or the European Patent Office),⁹⁵ the primary source of authority and regulation continues to be geographic.

As a legal profession and as a society, we have not yet worked out this mismatch between the virtual practice world and our physically defined regulatory world. Some doubt this mismatch exists, pointing to the local nature of many lawyers' practices. But even if it is true that most lawyers practice alone or in small firms serving local clients on primarily local matters, there is still a mismatch between practice and reality. Why? Even these lawyers who have an essentially local practice probably take

Market: A Comparative Regulatory Response, available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/UK_paper.doc/\\$file/UK_paper.doc](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/UK_paper.doc/$file/UK_paper.doc) (presented at *Regulating and Deregulating Lawyers in the 21st Century*, June 3–4, 2010, London, England). See generally *Speeches and Papers*, N.S.W. OFF. LEGAL SERVICES COMMISSIONER, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches (last visited Apr. 21, 2012).

94. Terry, Mark, & Gordon, *supra* note 7, at 2703, 2715–19.

95. See, e.g., International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 22 (adopted Sept. 3–10, 2002), http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf; *Counsel Authorised to Act Before the Court*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Counsel/> (last visited Apr. 21, 2012); *Admittance and Enrolment*, EUR. PATENT OFFICE, <http://www.epo.org/learning-events/eqe/admission.html> (last visited Apr. 21, 2012).

advantage of the “unbounded” virtual ways to practice law—they may return a client call on a cell phone while on vacation and without the client knowing that the lawyer is not in the office, or they may answer emails from anywhere in the world without the client realizing that they are not down the street. Lawyer regulators, however, have not had the same amount of freedom to escape the limits of geography. Thus, one of the current issues facing regulators is how to reconcile the realities of virtual law practice with the traditional regulatory approach in which their authority was framed in geography-based terms. One should expect to see continued discussions of where lawyers should be regulated and where regulators have jurisdictional authority.

*E. How Lawyers Are Regulated:
Outcomes-Based Regulation Versus Rules*

Another trend in lawyer regulation is increased interest in the issues related to the method of regulation or *how* one regulates. One example of this interest is the increased discussion about whether a single regulatory approach should be used for all lawyers and all sizes of firms. In 2009, the influential U.K. “Smedley Report” recommended differentiated types of regulation depending on the size of the law firm and the sophistication of the clients.⁹⁶ The issue of the desirability of “one size fits all” regulation has been discussed in other forums.⁹⁷

Another example of the *how* question concerns the style of regulation. Whether regulation should use “rules” or “standards” is not a new debate,⁹⁸ but there seems to be increased interest in this topic, especially about whether jurisdictions should adopt an “outcomes-based” or “principles-based” approach to lawyer regulation.⁹⁹ An outcomes-based approach uses broad principles instead of detailed rules for regulation.¹⁰⁰

96. NICK SMEDLEY, REVIEW OF THE REGULATION OF CORPORATE LEGAL WORK (Mar. 31, 2009), available at http://www.lawcentres.org.uk/uploads/Review_of_the_Regulation_of_Corporate_Legal_Work_03.09_.pdf.

97. See, e.g., *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Professional Services—Scope for More Reform*, at para. 13, COM (2005) 405 final (Sept. 5, 2005) (“The key finding is that one-off users, who are generally individual customers and households, may need some carefully targeted protection. On the other hand, the main users of professional services—businesses and the public sector—may not need, or have only very limited need of, regulatory protection given they are better equipped to choose providers that best suit their needs. . . . The differing interests of these groups should therefore be paramount in reviewing existing regulation and rules.”).

98. See, e.g., Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117, 1117 (1999).

99. See generally *Outcomes-Focused Regulation at a Glance*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page> (last updated Oct. 10, 2011).

100. Julia Black, Martyn Hopper, & Christa Band, *Making a Success of Principles-Based Regulation*, 1 LAW & FIN. MARKETS REV. 191, 191 (2007). For further information about outcomes-based regulation, see RT HON LORD HUNT OF WIRRAL MBE, THE HUNT REVIEW OF THE REGULATION OF LEGAL SERVICES (Oct. 2009), available at <http://www.lawcentres.org.uk>.

A number of jurisdictions have recently adopted, or have been asked to adopt, an “outcomes-based” regulatory approach for the legal profession. Australia adopted outcomes-based regulation for legal services in the 1990s as part of the implementation of the legislation permitting ILPs, and it has been included as a fundamental feature of the New South Wales system for regulating ILPs.¹⁰¹ England and Wales have also adopted outcomes-based regulation. Lord Hunt of Wirral, in his influential 2009 review of the regulation of U.K. legal services, recommended outcomes-based regulation as the preferred approach for the regulation of the legal profession in the United Kingdom.¹⁰² The United Kingdom Solicitors Regulation Authority’s new Handbook for solicitors that took effect on October 6, 2011 uses an outcomes-based regulatory approach.¹⁰³

Outcomes-based regulation does not mean sole reliance on principles per se. A successful outcomes-based system recognizes that regulation is a balancing act, and that on some occasions fixed rules may be necessary.¹⁰⁴ It is as much about the approach of the regulator and firms as it is about the format of regulatory requirements. For example, the Financial Services Authority in the United Kingdom has a set of “Principles for Businesses” and an extended set of rules and guidance which amplify the principles in given scenarios, such as the conduct of the sale of financial services products, handling client money, trading in securities, managing conflicts of interest, and capital adequacy requirements.¹⁰⁵

Outcomes-based regulation is not without its critics. For example, during the October 2011 Fordham University School of Law colloquium on Globalization and the Legal Profession, Professor Christopher Whelan challenged this approach, citing the uncertainty that can be exploited by those being regulated.¹⁰⁶ Given the success of the Australian approach and the influence of the U.K. Act, however, it is likely that the issue of outcomes-based regulation will be receiving increased attention in the

org.uk/uploads/Legal_Regulation_Report_October_2009.pdf; Julia Black, *Forms and Paradoxes of Principles Based Regulation* (LSE Law, Soc’y & Econ. Working Papers No.13/2008, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267722.

101. *Legal Profession Act 2004* (NSW) s 140 (Austl.); see also *supra* notes 82–88 and accompanying text.

102. See HUNT, *supra* note 100, at 9.

103. See, e.g., *Outcomes-Focused Regulation at a Glance*, *supra* note 99. The Legal Services Board approved this Handbook on June 17, 2011. See LEGAL SERVS. BD., DECISION NOTICE ISSUED UNDER PART 3 OF SCHEDULE 4 TO THE LEGAL SERVICES ACT 2007, at 7 ¶¶ 41–44 (June 17, 2011), available at http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/rules_decision_notice_final.pdf; *SRA Handbook*, *supra* note 17; see also *Outcomes-Focused Regulation: Overview*, LAW SOC’Y ENG. & WALES (Sept. 20, 2011), <http://www.lawsociety.org.uk/productsandservices/practicenotes/ofroverview/4988.article>.

104. Black, Hopper, & Band, *supra* note 100, at 200.

105. FIN. SERVS. AUTH., PRINCIPLES FOR BUSINESSES (Mar. 2012), available at <http://media.fsahandbook.info/pdf/PRIN.pdf>; *FSA Handbook*, FIN. SERVICES AUTHORITY, <http://fsahandbook.info/FSA/html/handbook/> (last visited Apr. 21, 2012).

106. Professor Whelan advises us that his oral remarks built on his prior work. See, e.g., DOREEN MCBARNET & CHRISTOPHER WHELAN, *CREATIVE ACCOUNTING AND THE CROSS-EYED JAVELIN THROWER* (1999).

future. Thus, lawyers and their regulators should expect to see continued discussions in the future about how lawyers should be regulated.

F. Why Lawyers Are Regulated: The Use of Regulatory Objectives and “Purpose Statements”

Despite its fundamental importance, the issue of *why* regulate does not appear to have taken a visible center stage in most systems of lawyer regulation.¹⁰⁷ Anecdotal evidence suggests that around the world, it is common to have lawyer regulations that do not emphasize or clearly articulate the objectives of that regulation or its purpose.¹⁰⁸ This is true regardless of the type of legal instrument used to regulate lawyers and regardless of whether lawyer regulation in that jurisdiction is based on rules or standards, or whether it takes an *ex ante* or a *ex post* approach, and regardless of whether it seeks to regulate activities (legal services) or individuals (lawyers). In other words, the *why* variable is independent from the other variables of *who* regulates, *who is* regulated, *what* conduct is regulated, *when* regulation occurs, and *how* regulation occurs.

Although the lack of explicit regulatory objectives seems to be the global norm, there are exceptions. For example, section 1 of the U.K. Act sets forth eight “regulatory objectives” that must be the basis of lawyer regulation.¹⁰⁹ Although there was considerable debate about what should be included within section 1, there now appears to be a consensus that all future legal profession regulations should advance one or more of the goals set forth in that section.¹¹⁰ In 2010, Scotland adopted a new law that includes regulatory objectives.¹¹¹ Canada is another example of a jurisdiction that has explicitly articulated the objectives of legal profession regulation.¹¹² Unlike in the United Kingdom and Scotland, however, Canadian objectives do not appear, for the most part, to have been subject to vigorous debates and controversy.¹¹³ Australia also has draft national legislation setting out regulatory objectives that is likely to be adopted in most Australian states and territories within the next twelve months.¹¹⁴ Individual Australian regulators have, on their own, also adopted purpose statements and regulatory objective provisions.¹¹⁵ Other jurisdictions, including Ireland and India, have pending draft objectives for the legal profession.¹¹⁶

107. For a more in-depth discussion of this issue, see Terry, Mark, & Gordon, *supra* note 7, at 2687.

108. *See id.* at 2724 n.207 (citing responses to the authors’ email inquiries).

109. Legal Services Act, 2007, c. 29, § 1 (U.K.).

110. *See generally* Terry, Mark, & Gordon, *supra* note 7.

111. *See* Legal Services (Scotland) Act, 2010, (A.S.P. 16), § 1.

112. *See, e.g.,* Legal Profession Act, S.B.C. 1998, c. 9, § 3, (Can.). For additional information, see Terry, Mark, & Gordon, *supra* note 7, at 2703–04.

113. *See* Terry, Mark, & Gordon, *supra* note 7, at 2706.

114. *See, e.g.,* COAG DRAFT NATIONAL LAW, *supra* note 45.

115. *See, e.g.,* N.S.W. *About Us*, *supra* note 47; *see also* Terry, Mark, & Gordon, *supra* note 7, at 2710–12.

116. *See* Terry, Mark, & Gordon, *supra* note 7, at 2715–16 (citing the draft laws in India and Ireland).

There are a number of reasons why it is important to include regulatory objectives in the appropriate governing instruments. Indeed, we consider this topic so important that we have written a companion article for this colloquium that addresses this topic in more depth. As that article explains, regulatory objectives are useful both *before* and *after* lawyer regulation is adopted. First, the inclusion of regulatory objectives sets out a defined purpose of legislation and its parameters. Regulatory objectives serve as a guide to assist those regulating the legal profession and those being regulated. To assist those affected by the particular regulation, they identify the purpose of the regulation and why it is enforced. Second, regulatory objectives assist in ensuring that the function and purpose of the particular legislation is transparent. So, when the regulatory body administering the legislation is questioned about their interpretation of the legislation, the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Third, regulatory objectives can help define the parameters of the legislation and may assist in determining the breadth and depth of legislation. Fourth, regulatory objectives may create a better working relationship between regulatory bodies and the profession by promoting co-operation in the production of guidelines for how the profession should comply with the regulatory objectives and the purpose of the legislation.

For these reasons, it should come as no surprise that in light of the complex nature of issues set forth in this Article, regulators are increasingly seeking the guidance that is available from regulatory objectives, and that this is one of the trends in lawyer regulation.

CONCLUSION

One of the consequences of globalization has been new challenges and pressures for regulators of the legal profession. The legal profession, its regulators, and its stakeholders face a number of specific yet multifaceted, complex, multidisciplinary, and difficult issues. As a result of globalization and technological developments, lawyers, clients, governments, regulators, and other stakeholders around the world can easily communicate and transact with one another. Consequently, one must expect that ideas and developments from one part of the world are likely to be discussed and debated elsewhere, even if they are not ultimately adopted. In addition to focusing on specific issues, the legal profession and its regulators should collectively consider some of the broader thematic issues and contexts in which these specific issues arise. Many contemporary issues are examples of global challenges and trends to reconsider the issues of *who* regulates lawyers, *who or what* is regulated, *when* regulation should occur, *where* it should occur, *how* it should occur, and *why* it should occur. Accordingly, it would be useful for all lawyers, regulators, and stakeholders to consider the issues contained in this Article if they have not already done so.